

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

74-2244

United States Court of Appeals

For the Second Circuit

FREDERICK E. TINSLEY and ANSTALT DYNOS,
Plaintiffs-Appellees,
against

MAVALA, INC. and C. BENJAMIN DINERSTEIN,
individually and doing business under the name and
style of C-B SALES CO. and BENDYNE, LTD.,
Defendants-Appellants.

**On Appeal from the United States District Court
For the Southern District of New York**

APPELLANTS' REPLY BRIEF

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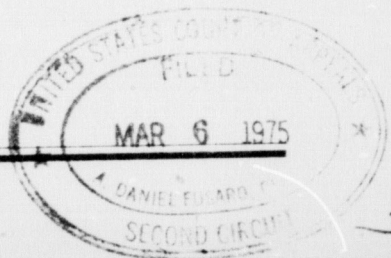


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Appellants respectfully submit this Reply Brief in opposition to Appellees' Brief in Opposition.

**Proceedings Subsequent to Entry of
the Interlocutory Judgment**

Appellees attempt to attribute ulterior motives to the acknowledged initial delays in the submission of the books and records of Bendyne for examination by representatives of plaintiffs. The basic reason for the reluctance of

Appellants to produce the Bendyne books and records, *carte blanche*, was that from the inception of the litigation continuing up until the present time, plaintiffs' product, *Scientifique*, and Bendyne's product, *Living Nail*, have been in continuous active sales competition throughout the United States.

Originally, defendants attempted to convince the plaintiffs that the business activities of Bendyne through December 31, 1971 had been unprofitable. When this information proved to be unsatisfactory to plaintiffs, defendants offered to mask over in the Bendyne records the identity of Bendyne's customers and sources of supply. After the records had been masked and produced to plaintiffs' representatives, plaintiffs reported that they were unable to make an intelligent evaluation of the records. Subsequently, on September 1, 1972 at a conference before Judge Gagliardi, the court directed that the Bendyne books and records be produced without any masking on condition that the production would be deemed to be made in accordance with the contents of the confidentiality stipulation which had been presented by plaintiffs' counsel in the latter part of June 1972. The attempt by plaintiffs' counsel to create a contrary position (page 13, Appellees' brief) is simply inaccurate. It is of significance to note that when Bendyne's president referred to these conditions in his affidavit of July 6, 1973 (135a), no objection to such statement was made by plaintiffs' counsel. The court below, at all times, was made fully aware of the continuing and ongoing competition that existed in the marketplace with regard to the two nail-hardening products.

Review of Bendyne's Records by Plaintiffs' Representatives

Pursuant to the directions of Judge Gagliardi, plaintiffs' attorneys and accountants were given complete access to the Bendyne records and did, in fact, review them for a period in excess of five months. During the course of such review, defendants did apply to the court, by motion, to modify the interlocutory judgment (44a). The application to modify the interlocutory judgment was not in any way related to an attempt to terminate the activity of plaintiffs' accountants and attorneys in reviewing the Bendyne records. The motion to modify the interlocutory judgment was based upon the undisputed fact that the formulas of *Scientifique* and *Living Nail* were chemically distinct and different and therefore not similar and that the formulation of *Living Nail* was in the public domain while the formulation of *Scientifique* was the subject of a patent issued by the United States Patent Office (45a-46a). In addition, such motion was intended to demonstrate to Judge Gagliardi that the *finding made by Judge Solomon*, in his opinion, after trial, that defendants' sales of *Living Nail* precluded plaintiffs from selling *Scientifique* in this country was in error and fully controverted by records in the United States Patent Office. The Patent Office records demonstrated that since at least the spring of 1964, *Scientifique* had been imported into the United States and sold in department stores from coast to coast (46a). The motion was in no way directed to an attempt to terminate the accounting as asserted by defendants. In fact, at the time the motion was made, plaintiffs' accountants had been reviewing the Bendyne records for a period of over two months and continued such examination through the latter part of February 1973.

The Adequacy of the Bendyne Records

Plaintiffs' criticism of the adequacy of the Bendyne records must be measured against the undisputed fact that such records are a conventional double-entry bookkeeping system which were at all times maintained by Ash & Parson, Independent Certified Public Accountants (133a-134a). Plaintiffs' assertion to the court below and to this Court that the records maintained by defendants contained no information regarding raw materials required in the manufacturing process of *Living Nail* and no entries regarding the packaging or bottling of the product must be evaluated against the purchase of the liquid nail hardener from Foster D. Snell Inc. between 1964 and 1967 and W. B. Chemical Company in 1970 and 1971 (153a). In addition, the bottling and packaging of the product was performed by Fessler Bros. between 1964 and 1972 (166a). In substance, it is clear that plaintiffs' brief ignores the detailed answers to plaintiffs' interrogatories and supporting exhibits which were supplied to plaintiffs (140a-166a).

Although plaintiffs' accountants had access to Bendyne's records for in excess of four months, no report by plaintiffs' accountants was submitted to the court below or supplied to defendants. In addition, except for minor requests for explanations regarding accounting work sheets prepared by Ash & Parson, no substantive inquiries were made by plaintiffs' accountants to Bendyne's accountants.

No inquiries were made by plaintiffs' accountants to Dinerstein, his wife (who has been active in the business), or other Bendyne employees.

Defendants' Answers to Plaintiffs' Interrogatories

It is submitted to the court that a substantial amount of the suspicion, surmise and speculation of the plaintiffs' counsel with respect to entries in the Bendyne books and records has been clarified by defendants' answers to plaintiffs' interrogatories. Thus, the identity and business purpose of Bendol has been clarified (142a). The identity of Benesco as an independent advertising agent has been established (158a) and a complete summary of all employees and advertising expenditures has been supplied (162a-165a). Defendants have conceded that for a period in 1971 certain personal expenses of Dinerstein were paid by Bendyne. However, the answers to the interrogatories show that Dinerstein had loaned Bendyne \$4,000 in 1968 and \$22,500 on January 12, 1971 (158a). Plaintiffs have ignored the assertion that any such personal expenditures were debited as an offset against the Dinerstein loans to Bendyne (191a). Similarly, plaintiffs' contention that Bendyne's assets were wasted by payments for Dinerstein's legal printing bills in an unrelated litigation ignores the acknowledgment that the sum of \$2,305 paid by Bendyne is an additional offset against the outstanding Dinerstein loans to Bendyne (192a).

It appears that plaintiffs have misconstrued the relationship between Bendyne Products Inc. and Bendyne, Ltd. Bendyne Products Inc. was formed for the purpose of manufacturing and selling a cooling foot spray. Bendyne Products Inc. became dormant in or about 1966. Subsequently defendants received the inventory of Bendyne Products Inc. and filled any requests for orders for *Living*

Steps, a foot spray product manufactured by Bendyne Products, Inc. Thus, Bendyne, Ltd., without expenditure for advertising or for the product received the benefits of periodic sales aggregating in excess of \$8,500. Contrary to the claim of plaintiffs, no assets of Bendyne, Ltd. were involved in the manufacturing or marketing of *Living Steps* (195a-196a).

Ben lyne's Request that a Special Master Be Appointed

In his opinion, Judge Solomon, in dealing with the question of what sums might be due to Tinsley, found that if the parties were unable to agree upon the amounts due Tinsley within 30 days, that issue would be referred to a Special Master (13a). This finding was incorporated in the interlocutory judgment (15a). When it became clear that the parties were involved in a serious dispute as to what amounts, if any, were due to Tinsley, the defendants repeatedly requested that a Special Master be appointed as contemplated by the opinion and interlocutory judgment. It is difficult to understand how plaintiffs can seriously characterize the request for the appointment of a Special Master as " * * * an obvious and desperate attempt to terminate the accounting and prevent plaintiffs from obtaining the information necessary to make an intelligent assessment of Bendyne's financial affairs * * *" (Appellees' brief, p. 26). As Appellants originally pointed out (Appellants' brief, p. 12) a Special Master could most adequately perform the task involved after appropriate investigation and a review of the financial records of the defendants. Plaintiffs have failed to rebut this contention.

It must be clear to this Court that the duties and functions which Judge Gagliardi directed be performed by Mr. Devine pursuant to the order entered on August 29, 1974 are more properly those of a Special Master rather than a Receiver. The only plausible explanation for plaintiffs' persistence in urging the appointment of a Receiver of Bendyne is to permit plaintiffs to use the fact of the appointment of a Receiver to compete unfairly in the market place.

POINT I

The Court should have denied the application for the appointment of a Receiver of Bendyne.

Plaintiffs' brief does not meet squarely the main thrust of Point I of defendants' brief, to wit, the alleged basis of plaintiffs' motion for the appointment of a Receiver is a series of unsubstantiated allegations of waste of Bendyne's assets which took place between 1964 and 1971. Read in the light most favorable to plaintiffs, the conflicting affidavits submitted to the Court below show that any purported improper expenditures from the Bendyne assets terminated in 1971.

In such a factual framework it is submitted by the defendants that the plaintiffs have not met the burden of demonstrating *urgent necessity created by an existing emergency condition*. *Wickes v. Belgian American Educational Foundation, Inc.*, 266 F. Supp. 38 (S.D.N.Y., 1967); *Maxwell v. Enterprise Wall Paper Mfg. Co.*, 131 F.2d 400 (3rd Cir., 1942).

While the actions complained of by plaintiffs may give rise to a claim for damages for alleged past misconduct,

the appointment of a Receiver was unnecessary and improper. This is particularly true where other milder measures, such as the appointment of a Special Master, will adequately protect the rights of a creditor. See, *Marwell v. Enterprise Wall Paper Mfg. Co.*, *supra*, at 403.

While defendants concede the existence of certain of the factual distinctions between the *Marwell* case and the instant case (e.g., lack of notice and an opportunity to be heard), it is urged that the underlying legal principles of the *Marwell* case should be applied and that therefore the order of Judge Gagliardi should be reversed, or, in the alternative, modified to the extent of appointing Mr. Devine as the Special Master of Bendyne.

Conclusion

The order of the Court below (Gagliardi, J.) appointing Michael Devine as Receiver of Bendyne should be reversed, or, in the alternative, modified by providing that Michael Devine be appointed as Special Master rather than Receiver, and the costs of this appeal should be awarded to the defendants-appellants.

Dated: New York, New York
March 5, 1975

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Defendants-Appellants

MICHAEL K. STANTON
Of Counsel

Service of 2 copies of the
within Brief is hereby
admitted this 6th day of

March 1975

Signed

Golenbock & Barell
Attorney for Flaundrup Appel

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MAR 6 1975

@ 4:40 P.M.

J.H.

GOLENBOCK & BARELL